

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM STEVEN TWEEDLY,

Defendant-Appellant.

UNPUBLISHED

April 17, 2007

No. 267148

Oakland Circuit Court

LC No. 2005-200207-FH

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 6 to 30 years' imprisonment. Because defendant was not denied his right to a fair trial, was not denied the effective assistance of counsel, and his due process rights were not violated, we affirm.

Defendant first argues the prosecutor committed misconduct by denigrating certain defense witnesses and by unnecessarily referencing defendant's character. "[P]reserved allegations of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). Unpreserved assertions of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *Id.*

Defendant preserved his assertion that the prosecutor engaged in misconduct by asking witness Donald Sutcliffe about a drug raid at a home in the neighborhood where both the victim and Sutcliffe lived. Specifically, defendant argues that the prosecutor wrongfully connected Sutcliffe to illicit drug activity. However, the witness claimed to be aware of what was going on in his neighborhood. The prosecutor properly tested the credibility of this claim by asking him about the drug bust. Further, although the prosecutor may have impliedly associated him with a group of individuals rumored to be involved in illicit activity, this implication does not substantially outweigh the probative value of the evidence sought.

Defendant's next two claims of prosecutorial misconduct, are unpreserved. Defendant argues that the prosecutor improperly questioned defense alibi witness Lloyd Bowling about an

outstanding arrest warrant for drunk driving and improperly referenced the warrant in closing argument. The record reveals that the prosecutor asked about the outstanding warrant in the context of probing the witness about the quality of his memory, and, did not draw a clear connection between the issue of the witness's memory and the outstanding warrant when mentioning the warrant in closing argument. After reviewing the comments in context, we conclude that the negative implication left about Bowling's character outweighs the minimal probative value of this evidence on the issue of the witness's memory. But, in light of the substantial evidence of defendant's guilt, including eyewitness testimony placing defendant inside the victim's home on the day of the theft and walking out of the home, the prosecutor's conduct did not affect defendant's substantial rights. Further, in light of the evidence and the jury trial as a whole, defendant fails to show that the improper inquiry resulted in the conviction of an actually innocent defendant or undermined the integrity of the trial. *Goodin, supra* at 432.

Defendant also argues that the prosecution impermissibly referenced defendant's character when it questioned defendant's wife about her separation from defendant. Specifically, the prosecution asked defendant's wife if defendant was "taking his mini-vacation with some girl across from Durby's Bar." However, the record reveals that it was defense counsel who first brought up the separation between defendant and his wife and the fact that defendant moved into a house across from a bar. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). In any event, defendant's wife denied anything improper was occurring between defendant and the other woman. Moreover, the trial court instructed the jury that mere questions and comments by the attorneys were not evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant fails to establish plain error affecting his substantial rights.

Defendant next asserts that he was denied his right to the effective assistance of counsel when counsel failed to exercise due diligence in locating potential witnesses who would have corroborated his mistaken identity/alibi defense. Because defendant did not move for a new trial or evidentiary hearing, our review of this claim of error is limited to the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). An accused's right to counsel encompasses the right to "effective" assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 674 (1984). Reversal of a conviction is required where counsel's performance falls below an objective standard of reasonableness, and the representation so prejudices the defendant as to deprive him of a fair trial. *Id.* at 687. The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy[.]" *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant argues in particular that because some witnesses at trial indicated they had mistaken another person for defendant on prior occasions, defense counsel should have further developed a mistaken identity/alibi defense by calling more witnesses. But the record shows that defense counsel did put on several witnesses supporting defendant's mistaken identity/alibi defense. Two witnesses testified about previously mistaking defendant's identity for that of another person. A third witness testified that defendant was at a bar at the time the home invasion occurred. Counsel also pursued the defense in both opening and closing argument to the jury. The decision on what witnesses defense counsel called to advance this theory of

defense is a matter of trial strategy that we will not second-guess. *Davis, supra*. And, defense counsel's choice not to personally serve subpoenas to additional, cumulative witnesses does not amount to ineffective assistance of counsel. Further, defense counsel was also not ineffective for failing to present expert testimony regarding perception. See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Defendant was not denied the effective assistance of counsel.

Finally, defendant argues that his due process rights were violated when the prosecution failed to assist him in locating potential defense witnesses to corroborate his alibi. A prosecutor has a duty to take reasonable steps in locating potential witnesses. *People v Gunnnett*, 182 Mich App 61, 67; 451 NW2d 863 (1990). MCL 767.40a(5) states as follows in pertinent part:

The prosecuting attorney or investigative law enforcement agency shall provide to defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness.

Here, the record does not indicate that defendant requested assistance from the prosecutor, and defendant does not argue on appeal that he requested such assistance. Plainly, MCL 767.40a(5) only requires assistance "upon request." Without this request, the prosecution did not violate any duty owed to defendant. In any event, defendant already had several alibi witnesses testify on his behalf.

Affirmed.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey